

87 - 1557
No. _____

Supreme Court, U.S.

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

1000 FRIENDS OF OREGON,
the assumed name of Oregon Land Use Project, Inc.,
an Oregon non-profit corporation,
KELLY McGREER, ROSEMARY McGREER,
JAMES G. PERKINS, SHIRLEE PERKINS,
DAVID DICKSON and MELINDA DICKSON,
Petitioners,

v.

WASCO COUNTY COURT, DAVID KNAPP,
RICHARD DENNIS SMITH,
KENT BULLOCK, SAMADHI MATTHEWS,
Respondents,

CITY OF RAJNEESHPURAM and
RAJNEESH FOUNDATION INTERNATIONAL,
formerly
CHIDVILAS RAJNEESH MEDITATION CENTER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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QUESTION PRESENTED

Whether federal due process requires invalidation of a county government's "quasi-judicial" land use decision when a county official casting one of two deciding "yes" votes fails to publicly disclose at a hearing on the matter, a pending oral agreement to sell 48 cattle for \$17,540 to the applicant for the land use approval, where the pending cattle sale was (1) needed financially by the seller/official fact-finder, (2) irregular in several respects, (3) concealed by the applicant for the land use approval from the county district attorney who inquired about it, (4) based on an above market price, (5) not consummated in terms of delivery of cattle or payment to the county official until 5 and 11 days, respectively, after the county official voted "yes."

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PETITION FOR WRIT OF CERTIORARI TO
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1000 Friends of Oregon, et al,
petitions for a Writ of Certiorari to
review the judgment of the Oregon Supreme
Court in this case.

OPINIONS BELOW

The opinion of the Oregon Supreme Court (App. A, infra)¹ is reported at 304 Or 76, 742 P2d 29 (1987), petition for reconsideration denied, (App. B, infra), November 24, 1987. The opinion of the Oregon Court of Appeals (App. C, infra) is reprinted at 80 Or App 532, 723 P2d 1034 (1986). The opinion of the Oregon Land Use Board of Appeals, LUBA No. 81-132, (App. D, infra) is reported at 14 Or LUBA 315 (1986).

JURISDICTION

1 Appendixes A through E are separately bound as Appendix to Petition for Writ of Certiorari to the Supreme Court of the State of Oregon. Appendix F follows the text of this petition and begins with page A-110. All references to App. ___, A-___ are to the above appendixes. Other references are to the record below.

The decision of the Oregon Supreme Court was filed September 9, 1987 (App. A, infra). The petition for reconsideration of 1000 Friends of Oregon, et al was denied November 24, 1987 (App. B, infra). On February 20, 1988, Associate Justice of the Supreme Court of the United States, Sandra D. O'Connor, ordered that the time for filing the petition for writ of certiorari in this case be extended to and including March 14, 1988 (App. E, infra). The jurisdiction of this court is invoked under 28 USC Section 1257(3).

STATEMENT

Petitioners² seek review of an order in which the Oregon Supreme Court, reversing the Oregon Court of Appeals, upheld an Order of the Oregon Land Use

² 1000 Friends of Oregon is a nonprofit corporation formed in 1974 to support implementation of Oregon's land use laws. Individual petitioners own ranch properties adjacent to or near the land sought to be incorporated.

Board of Appeals (LUBA) and held that certain undisclosed business dealings between Wasco County Judge Richard Cantrell and those seeking to incorporate the City of Rajneeshpuram did not invalidate Cantrell's quasi-judicial vote in favor of holding an election on a petition to incorporate the city. 1000 Friends of Oregon v. Wasco County Court, (App. A, infra), 304 Or 76, 742 P2d 29 (1987). The land proposed for incorporation was a 2,135 acre portion of a 64,000 acre ranch in single ownership.

1. The undisclosed business relationship between Judge Cantrell and the land use applicant.

The Oregon Court of Appeals stated LUBA found the following facts:

Cantrell visited Rancho Rajneesh (the former Big Muddy Ranch) in August, 1981, together with other members of the Wasco and Jefferson County Courts. At that time representatives of the ranch--who were also representatives of the petitioners for incorporation--told Cantrell that they were interested in buying cattle. In early October, Cantrell and his wife dined at the ranch, and

one of its leaders again raised the subject of buying cattle. Cantrell recommended that they buy "hamburger grade" cattle, which happened to be what he had for sale. He thereafter told the two Wasco County commissioners that he intended to sell cattle to the ranch, but he did not publicly disclose his dealings before the county court acted on the incorporation petition. He formally proposed to sell cattle to the ranch in a letter[³] dated October 13, 1981, after the county court had rejected the original incorporation petition as legally deficient. On October 14, representatives of the proposed city presented a corrected petition.

Rancho Rajneesh leaders were conscious of the effect Cantrell's sale of cattle might have on his vote on the incorporation petition. One of the leaders asked the ranch foreman to keep the sale low-key so as not to embarrass Cantrell. Ma Anand Sheela, one of the ranch leaders, told the foreman to pay Cantrell's asking price, because 'we needed him.' On October 22, Cantrell and ranch officials reached an agreement on the sale. (App C., A-42-43)

It is uncontroverted that no deposit was paid, that the agreement to purchase

3 Cantrell's letter stated "I'm going to have to sell alot [sic] of mine [cattle] because the wheat crop wasn't large enough to pay my bank loan the 1st of November." (A-19).

cattle was never put in writing, and that Cantrell typically sold locker beef to local buyers in small quantities.⁴

LUBA did not comment on the following uncontroverted evidence of Cantrell's financial circumstances. During the period 1975 to 1983, Cantrell Ranch was financed through annual lines of credit issued by a local bank. Repayment in full was due on the final day of the credit year, ordinarily in the month of November. D. Hunt 10-13 (A-92 to A-95).

Unlike most farmers in the Dufur area, Cantrell regularly failed to pay off his line of credit by the due date. Id. 50 (A-100). During this period, 1975 was the only year in which he succeeded in

⁴ "Locker Beef Our Specialty" is imprinted on Cantrell's business checks. Locker beef is generally sold in small quantities to individuals for their personal lockers. (D. Cantrell, p. 163) The summary of Cantrell's bank deposits between December 18, 1980 to September 21, 1985, indicates that 306 of 358 deposit entries were in amounts of \$500.00 or less, illustrating Cantrell's ordinary business dealings. Hunt Ex 5.

repaying the loan on time. Hunt Ex. 2.
During the period 1975-1980, Cantrell's bankers described his ranch as marginal on the forms they used to advance credit. D. Hunt 49 (A-99); Hunt Ex. 2.

In September, 1981, Cantrell sold his wheat crop for \$33,476.58 and made payments to the bank on his line of credit in that amount. Even with these payments he still owed the bank \$16,500.60 and had no funds remaining available to him from the line of credit, which he had exhausted in July. Hunt Ex. 2.

Needing operating funds, Cantrell obtained a \$14,000 short-term bank loan due on December 15, 1981, a time by which Cantrell ordinarily would receive bank approval for his 1982 line of credit. D. Hunt 28 (A-98). Cantrell had never before been forced to borrow against the following year's credit line. Hunt Ex. 2.

In 1981, expenses at Cantrell Ranch

exceeded receipts by nearly \$33,000, compared with a cash shortfall of only \$5,406 the preceding year. Pet. Ex. Q, Schedule 1 (App-4). During the period 1978 through 1981, Cantrell's total indebtedness increased by \$114,427. Id., Sched. 2 (App-5). Over those four years, Cantrell claimed a \$98,791 increase in his net worth. Id., Sched. 3 (App-5). However, this increase was due solely to Cantrell's estimates of increases in the value of his real property, based on Cantrell's beliefs about the worth of those assets, not on generally accepted accounting principles. Tr. 238 (A-110).

By October, 1981, when he offered to sell cattle to Rancho Rajneesh, Cantrell had sold all his crops, and had already sold as much locker beef in 1981 as he had projected selling that year. Hunt Ex. 2. Given his debt of \$16,500, he also faced the prospect of a substantial carryover

on his 1982 line, which he had already borrowed against.

Around the lunch hour on November 4, 1981, and prior to the county's hearing on the incorporation matter, Wasco County Roadmaster Rex Kniestad informed Wasco County District Attorney Bernard Smith of a rumor that Cantrell was doing business with Rancho Rajneesh. Smith informed Rancho Rajneesh leader Krishna Deva of the rumor and asked if it was true. Tr. 30-31. (A-113,113). Deva knew at this time that a cattle deal was pending between Rancho Rajneesh and Cantrell. D. Deva 8-10 (A-77 to A-79). Deva contacted Rancho Rajneesh manager Jayananda, who had authorized purchase of the cattle, then returned to Smith and told him that there were no business dealings between Rancho Rajneesh and Judge Cantrell. Tr. 31 (A-113). Smith did not check the rumor with Cantrell because he thought the rumor

was "preposterous" and thought he would be insulting Cantrell to ask him about it. Had he known about the sale, he would have advised Cantrell to disclose it. (A-112-117); D. Smith 16-22 (A 119-125).

At the conclusion of the public hearing that afternoon Cantrell voted "yes" in a 2-1 vote, approving the incorporation petition. The County Court also adopted an order supported by 40 pages of findings of fact and conclusions that the incorporation conformed to:

applicable provisions of ORS Chapter 221, the Statewide Planning Goals approved under ORS 197.005 to 1974.430, and the Wasco County Comprehensive Plan.

Neither Cantrell nor Rancho Rajneesh leaders testifying at the hearing disclosed the pending cattle sale.

On November 9, Cantrell delivered the cattle to ranch representatives. On November 15, a check for \$17,540 was issued to Cantrell for the cattle.

On November 17, 1981, Cantrell deposited the check with the U.S. Bank. Hunt Ex. 4.

Cantrell sold 48 cattle. LUBA found that the price paid for nine cow/calf pairs exceeded general market value by approximately \$150/pair, or \$1,350 for the nine pairs. Id. Tr. 353-354 (A-138,139).

For the cattle sold by weight at \$.50/pound, LUBA found that the 30 cattle weighing 23,830 pounds would have brought "several cents less per pound at the nearest auction year." (A-20).

LUBA was not more specific. For purposes of illustration, if "several cents" means five cents, the price difference would be \$1,192. Together with the \$1,350 above-market payment on the cow/calf pairs, the total overpayment would be \$2,542.

2. Proceedings in review of Wasco County's November 4, 1981 land use approval.

On January 8, 1982, 1000 Friends of Oregon appealed Wasco County's approval to the Oregon Land Use Board of Appeals (LUBA) alleging, inter alia, denial of "an impartial tribunal" guaranteed by Fasano safeguards and "14th Amendment Due Process Requirements" (Sixth Assignment of Error, Pet. for Review, page 23, January 8, 1982, LUBA No. 81-132).

On March 12, 1982, LUBA dismissed the petition on jurisdictional grounds saying the county's decision was not a "land use decision" subject to LUBA's power of review. 5 Or LUBA 133 (1982).

The Oregon Court of Appeals reversed LUBA, holding that counties must apply state land use goals to incorporation decisions, and describing the county's decision as:

the final quasi-judicial, discretionary decision that the county can make on application of the goals to incorporations, and as to incorporation itself.

1000 Friends of Oregon v. Wasco County Court, 62 Or App 75, 80-81, 659 P2d 1000, rev. den. 295 Or 359 (1983).

On September 30, 1983, on remand, LUBA issued a second opinion concluding that Wasco County's order violated statewide planning Goals 3 and 14. It also declared moot petitioners' allegation that petitioners' were denied an impartial tribunal. (App. F, A-116).

In upholding petitioners' standing, LUBA also found each individual petitioner had property interests adversely affected by the incorporation approval. (App. F, A-111-113).

An appeal of that order resulted in a second remand to LUBA, this time from the Oregon Supreme Court. The Court described the County's decision-making as follows:

[A]t the hearing the county court heard testimony pertaining to whether the proposed incorporation satisfied the requirements of ORS 221 and complied with the requirements of statewide planning goals. The county court made

extensive findings on the matter of compliance with the statewide planning goals, fixed the boundaries of the proposed city, and authorized a special incorporation election. 1000 Friends of Oregon v. Wasco County Court, 299 Or 344, 348-49, 703 P2d 207 (1985).

Disposing of all but two allegations of error, the Court reversed LUBA on the mootness of the impartiality issue and framed the issues on remand as follows:

(1) [w]hether the county court's Goal 3 suitability determination that 'the areas proposed for incorporation is not suitable for farm use' is supported by substantial evidence in the whole record; and

(2) [w]hether the Wasco County judge acted improperly, with prejudice of substantial rights, rendering the Wasco County Court order invalid? Id. at 376.

Petitioners were then able to obtain an order allowing depositions to be taken on the issue of an impartial tribunal.

After evidentiary hearings, filing of a prehearing order, argument, and briefing, on March 14, 1986, LUBA issued its order. LUBA concluded Wasco County's

approval of the incorporation petition violated LCDC's Goal 3 (Agricultural Lands) but that Judge Cantrell's business dealings with the incorporators:

do not show the vote on the incorporation was a direct result of the business dealings or that Judge Cantrell had prejudiced his decision as a result of his relationship with the cattle purchasers. We therefore find that Judge Cantrell did not suffer bias as a result of his business dealings. Because we do not find bias, we do not find prejudice to petitioners' substantial rights. (App. D, A-95-96); full statement of LUBA's findings on impartiality can be found at (App. D, A-80-90).

On May 14, 1986, the Oregon Court of Appeals reversed LUBA. It held petitioners' statutory right of standing to challenge county action violating state land use law was a "property interest" entitling them to an impartial decision-maker. (App. C, A-50-51). It also held that Cantrell's activities denied petitioners' 14th Amendment due process rights to an impartial

decisionmaker:

Cantrell should have disclosed his dealings with the ranch officials and, having failed to do so, was disqualified to sit on the petition for the incorporation election. Although we do not expect part-time local government officials--nor do we expect part-time arbitrators--to forego their normal business activities, when those activities include doing business with one of the parties who will be affected by a quasi-judicial decision, an official must disclose the business relationship to other affected parties. Because Cantrell did not take even that step, we need not decide whether he could have participated after disclosure if petitioners had objected. Under the circumstances, his participation made the county's action void. 1000 Friends of Oregon v. Wasco County Court, 80 Or App 532, 539 (App. C, A-55).

On September 9, 1987, the Oregon Supreme Court reversed the Oregon Court of Appeals. Because petitioners were "aggrieved" and thus able to invoke review, "property rights" of other parties entitled to due process could be affected. The Court thus reached the 14th Amendment issue.⁵ (App. A, A-28) However, the

⁵ Once a property interest is at risk,

Court held that Wasco County's decision could be invalidated on federal due process grounds only if there was a finding of "actual bias" on the part of Cantrell in favor of the land use applicants, or a finding that "Cantrell gained" by voting to approve the land use application. (App. A, A-35)

CONSTITUTION

Resolution of this case requires interpretation of the United States Constitution, Fourteenth Amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

the holder of that interest has standing and is entitled to procedural due process. Under Mathews v. Eldridge, 424 U.S. 319 (1976), the nature and extent of that interest will be considered in determining how much process is due, not whether it is due at all.

person within its jurisdiction the equal protection of the laws.

REASONS FOR GRANTING THE PETITION

The running, ugly sore of zoning is the total failure of this system of law to develop a code of administrative ethics. Stripped of all planning jargon, zoning administration is exposed as a process under which multitudes of isolated social and political units engage in highly emotional altercations over the use of land, most of which are settled by crude tribal adaptations of medieval trial by fire, and a few of which are concluded by confused ad hoc injunctions of bewildered courts.

R. Babcock, The Zoning Game, Univ. of Wis. Press (1962) p. 154. (emphasis supplied)

This petition presents the Court with an opportunity to determine whether the 14th Amendment voids a municipal land use decision dependent on impartial, contested factfinding when one of two local officials voting "yes" in a 2-1 decision fails to publicly disclose the existence of a substantial and favorable business transaction then pending between the official and the land use applicant.

A ruling on this issue by this Court will clarify how federal due process can serve as a minimum standard of fairness for municipal land use decisions which regulate the use of a particular piece of property.

1. At least seventeen states characterize some aspect of municipal land use decision-making as quasi-judicial or adjudicatory. Such characterization requires application of federal due process protection.

This Court's land use decisions over the past sixty years have focused on the constitutional sufficiency of two kinds of state and local land use "legislation." First, this court has determined whether regulation of real property has a substantial or rational relationship to a legitimate state interest.⁶ Second, this

⁶ See Euclid v. Amber Realty Co., 272 U.S. 365 (1926) (regulation must have substantial relationship to public health, safety, morals, or general welfare); Penn Central Transp. Co. v. City of New York, 439 U.S. 883 (1978) (aesthetic considerations held to have substantial relationship to legitimate state interest in improving quality of city life); Belle Terre v. Boraas, 416 U.S. 1 (1974)

Court has applied the Fifth Amendment⁷ prohibition against taking of property to determine whether land use regulation impermissibly restricts the use of real property.⁸ However, this Court has had

(ordinance limiting households to no more than two unrelated people upheld based on rational relationship to a permissible state interest); City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (special use permit requirement for retarded group home violates the equal protection clause as there is no rational relationship to a legitimate state interest to justify the disparate treatment).

7 "No person shall ... be deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. By incorporation into the 14th Amendment, U. S. CONST. amend. XIV, these protections have also been made applicable to the states.

8 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (prohibition against mining coal was a taking of property); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (requirement of free public access to newly-created lagoon in private development project was held a taking of property); Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. ___, 107 S.Ct. 1232 (1987) (prohibition against mining coal directed at public purpose upheld in face of general attack on regulation); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles 482 U.S. ___, 107 S.Ct. 2378 (1987) (if a taking is found, damages flow from date of

infrequent opportunity to insure that constitutional standards of procedural fairness apply to municipal land use decisions because, until recently, most local land use decision-making was considered "legislative" in character.

In City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976) this Court was unable to reach the question of the applicability of Fourteenth Amendment due process to the fairness of a municipal decision determining the right to a particular use of a particular parcel, where the state characterized the municipal land use decision as "legislative." The case involved a referendum on a proposal to change the zoning on eight acres to

enactment of local legislation, not date of judicial determination); Nollan v. California Coastal Comm'n, 483 U.S. , 107 S.Ct. 3141 (1987) (conditioning building permit on lateral public beach access held a taking of property because unrelated to public purposes stated in applicable land use regulation).

construct a high-rise apartment.

Noting "it is elementary that the decision-maker must be impartial," 426 U.S. at 693, Justice Stevens, dissenting, said

when we examine a state procedure for the purpose of deciding whether it comports with the constitutional standard of due process the fact that a state may give it a "legislative" label should not save an otherwise invalid procedure. Id. at 686.

Mr. Justice Brennan joined in this dissent. Mr. Justice Powell dissented on other grounds.

The majority, Berger, C. J., did not reach the procedural due process issue in part because it deferred to the Ohio Supreme Court's characterization of the City of Eastlake's referendum on the eight-acre rezone as "legislative." Id. at 673.⁹

⁹ The majority concluded this exercise of the legislative power was not subject to attack on the ground that it was a standardless delegation of legislative power because the power of referendum had been reserved to the people of Ohio by the Ohio constitution. Hence, no delegation

However, the factors which prevented the majority in Eastlake from reaching due process issues do not exist here. The Oregon courts held Wasco County's decision to approve the incorporation petition was quasi-judicial.

More important, the increasing number of states that now characterize some municipal land use decisions as quasi-judicial¹⁰ makes it important that

occurred. Accordingly, the majority reversed the Ohio Supreme Court which, on federal constitutional grounds, had invalidated the city's land use decision on a standardless delegation theory. 426 U.S. 679.

10 Land use decisions affecting individual rights in particular property have been considered adjudicatory in nature by at least seventeen states and D.C. Fasano v. Bd. of County Comm'rs., 264 Or 574, 507 P2d 23 (1973), overruled on other grounds, Neuberger v. City of Portland, 288 Or 585, 607 P2d 722 (1980) (zoning decision as to a particular tract of land found quasi-judicial rather than legislative). Horn v. County of Ventura, 24 Cal 3d 605, 596 P2d 1134, 156 Cal Rptr 718 (1979) (subdivision approval found quasi-judicial and subject to procedural due process). Flemming v. City of Tacoma, 81 Wash 2d 202, 502 P2d 327 (1972) (amendments or reclassifications found adjudicatory in nature and subject to due process requirements, including the

the Court articulate the applicability

appearance of fairness). Cooper v. Board of County Comm. of Ada County, 101 Idaho 407, 614 P2d 947 (1980) (rezoning found quasi-judicial and subject to procedural due process). Town v. Land Use Commission, 55 Hawaii 538, 524 P2d 84 (1974) (rezoning found quasi-judicial "contested case" subject to procedural safeguards of the Administrative Procedures Act). Kletschka v. LeSueur County Board of Comm., 277 NW2d 404 (Minn. 1979) (conditional use permit application found quasi-judicial and subject to due process notice and hearing requirements, but no right of cross-examination). Golden v. City of Overland Park, 224 Kan 591, 584 P2d 130 (1978) (rezoning found quasi-judicial subject to a reasonable standard of review). Kaelin v. City of Louisville, 643 SW2d 590 (1983) (rezoning found adjudicatory and notice and hearing with opportunity to cross-examine are required to meet due process). Geiger v. Levco Route 46 Associates, Ltd., 181 NJ Super. 278, 437 A2d 336 (1981) (site plan approval and variance application recognized as quasi-judicial and subject to procedural due process requirements). Winslow v. Town of Holderness Planning Board, 125 NH 262, 480 A2d 114 (1984) (subdivision decision found quasi-judicial and subject to due process, including notice and opportunity for a hearing before an unbiased tribunal). Capitol Hill Restoration Society v. Zoning Commission, 287 A2d 101 (D.C. 1972) (application for approval of planned unit development is adjudicatory in nature and entitled to Administrative Procedures Act protection as a contested case). Snyder v. City of Lakewood, 189 Colo 421, 542 P2d 371 (1975), overruled on other grounds, Margolis v. District Court, 638 P2d

and meaning of due process procedural requirements with respect to municipal land use decisions.

The absence of decisions from this Court on this point may lead state courts to assume, as the Oregon Supreme Court did, that this Court believes 14th Amendment procedural protections have but meager application to municipal decisions affecting the use of real property.

This Court could rule in this

297 (Colo. 1981) (rezoning found quasi-judicial for purposes of judicial review). Harris v. Goff, 151 So.2d 642 (Fla. 1963) (rezoning found legislative, but court acknowledges that quasi-judicial actions by the board require due process safeguards). Alabama Farm Bureau Mutual Casualty Ins. v. Bd. of Adjustment, 470 So.2d 1234 (Ala. 1985) (granting of a variance is a quasi-judicial function). Foreman v. Eagle Thrifty Drugs and Markets, Inc., 89 Nev 533, 516 P2d 1234 (1973) (proceeding becomes quasi-judicial where statute requires notice and hearing). Lowe v. City of Missoula, 165 Mont. 38, 525 P2d 551 (1974) (acknowledges that rezoning or granting of variances are quasi-judicial in nature). Wilson v. Manning, 657 P2d 251 (Utah 1982) (recognizes original enactment of zoning ordinance as legislative, but finding subsequent exceptions and variances merely "administrative.")

case that due process applies to adjudications-in-fact, regardless of state characterization, as Justices Stevens and Brennan have urged in Eastlake. 462 U.S. at 680.¹¹ Alternatively, this Court could defer to state characterization of municipal land use decisions as legislative or quasi-judicial, limiting due process applicability to municipal land use decision-making accordingly.

Either ruling would provide badly needed guidance regarding minimum standards of fairness to the municipal land use process.

2. The Oregon Supreme Court's interpretation of the 14th Amendment is inconsistent with Commonwealth.

While the Oregon Supreme Court applied the 14th Amendment to Wasco County's incorporation decision, it misinterpreted the 14th Amendment requirement of impartiality. The Oregon

¹¹ This holding could exclude cases like Eastlake where reserved legislative powers are at issue.

Court of Appeals held that:

the county's action was quasi-judicial, that petitioners were among those who had a due process right to an impartial decisionmaker and that Cantrell's financial involvement with those seeking incorporation disqualified him from participating in the vote, at least in the absence of a full public disclosure of his dealings. We therefore hold that the county's action in setting a date for the incorporation election was invalid. (emphasis supplied) 80 Or App 523, 535-536 (1986) (App C., A-45).

The Oregon Supreme Court reversed, holding that without a finding of "actual bias" or that "Cantrell gained" by voting to approve the land use application, federal due process does not invalidate such a local land use decision. The Oregon Supreme Court criticized the lower Court's holding saying it:

pushes general propositions from cases involving courts, administrative adjudications and arbitrations further than we think the United States Supreme Court would go in a decision of this kind. (App. A, A-35). (emphasis supplied)

However, in Commonwealth Corp. v.

Casualty Company, 393 U.S. 145 (1968)

this Court's invalidation of a unanimous arbitration award turned not on a showing of "actual bias" but solely on the failure of the neutral arbitrator to disclose a sporadic (last dealings were twelve months prior to the arbitration), but significant (\$12,000 over five years), business relationship between the neutral arbitrator and one of the parties to the arbitration. Indeed, the party attacking the arbitration award conceded, and the Courts below held, "the third arbitrator was innocent of any actual partiality, bias or improper motive." 393 U.S. at 152.

The Oregon Supreme Court is correct that this Court has invalidated adjudicatory-type decisions where the decisionmaker had a stake in the outcome Tumey v. Ohio, 273 U.S. 510, (1927) and Gibson v. Berryhill, 411 U.S. 564 (1973).

However, this Court's ruling in Commonwealth did not depend on the question of whether an adjudicator had a personal interest at stake in the outcome. Indeed, this Court said in Commonwealth the interest the judge in Tumey had in the outcome of the matter before him was "too small a distinction" to control the holding of Commonwealth, 393 US at 148. There was no showing that the arbitrator in Commonwealth had a "personal stake" in the outcome of the arbitration. Yet the arbitration award was invalidated for the failure to disclose a prior (not pending) business relationship with one of the parties to the arbitration.

The Oregon Supreme Court distinguished Commonwealth because the neutral arbitrator had performed services on the projects involved in the dispute, whereas, in this case, while Cantrell was selling cattle to the ranch, and the

incorporation of the same ranch was the matter before Cantrell as adjudicator, Cantrell had no undisclosed business relationship with the land use applicants with respect to the incorporation itself. (App A., A-32).

Petitioners submit that the facts in this case far outweigh this factual distinction noted by the Oregon Supreme Court and demonstrate a more compelling need for constitutionally mandated disclosure than did the facts in Commonwealth.

In Commonwealth, unlike Wasco County, there was no suggestion (1) that the arbitrator was owed money at the time of the arbitration by one of the parties to the arbitration, (2) that the arbitrator with the prior business relationship with one of the parties to the arbitration needed cash immediately and that the party to the arbitration had knowledge of that

fact, (3) that the arbitrator had been overpaid by the party to the arbitration, (4) that one of the parties to the arbitration intended to engage in business with the arbitrator as a means of currying favor with the arbitrator and (5) that either the arbitrator or the party to the arbitration lied about or otherwise actively concealed the existence of the business relationship.

Without reversing prior rulings in this case that Wasco County's approval of the petition to incorporate 2,135 acres was "quasi-judicial," and without questioning that resolution of disputed factual issues was essential to that decision, the Oregon Supreme Court pointed to two circumstances which it said make such decisionmaking more "quasi" than "judicial."

Their members are politically elected to positions that do not separate legislative from executive and judicial powers on the state or federal model; characteristically

they combine lawmaking with administration that is sometimes executive and sometimes adjudicative. The combination leaves little room to demand that an elected board member who actively pursues a particular view of the community's interest in his policy-making role must maintain an appearance of having no such view when the decision is to be made by an adjudicatory procedure. Also, the members of most governing bodies in this state serve part-time and without pay, making their living from the ordinary pursuits and private transactions of their communities. Restrictions on permissible business activities and sources of outside income imposed on judges for the sake of appearance do not apply by analogy to such board members. (App. A, A-19-20)

Whatever significance these comments might otherwise have, petitioners reject any implication of the comments that the 14th Amendment should not apply to the facts of this case.

First, no one in this case has suggested that a county commissioner with a strongly held policy view should pretend not to hold such a view when functioning in an adjudicative role. This is an

irrelevant strawman. There were few, if any, policy issues before the Wasco County Court about which any member of the Court was perceived by the public or parties to have any particularly strong view. The issues before the Court were primarily factual. The County Court's factfinding duties were no less extensive, less delicate, or less in need of impartiality than the determinations required of the arbitrators in Commonwealth, which involved whether a prime contractor owed money to a subcontractor for a paint job.

Second, applying due process to the type of governmental decision in this case would not restrict permissible business activities or sources of outside income for county commissioners in the way the Canons of judicial ethics restrain outside income for judges.

Commonwealth does not automatically restrain business activities by part-time,

non-court adjudicators. This Court simply insisted that when such relationships exist between a decisionmaker and a party before him/her, that the relationship be disclosed:

It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases. * * * We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias. (393 U.S. 149) (emphasis supplied)

Justice White wrote a concurring opinion joined by Justice Marshall which amplified Justice Black's majority opinion on the point quoted directly above:

The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. * * * But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. 393 U.S. 150. (emphasis supplied)

The Oregon Supreme Court also refers to "ordinary pursuits." Cantrell's specialty was selling a side or a quarter of beef to a local buyer for locker beef, not 48 head in one transaction. D. Cantrell 163 D. Hunt, [Ex. 4, 5] Nor was the transaction "ordinary" given Cantrell's need for cash in summer/fall 1981, and the above market sale price.

The Oregon Supreme Court also argued that the arbitrators in Commonwealth were "more 'judicial' and less 'quasi'" than the Wasco County Court in this case because Justice Black used judicial examples (a jury foreman with an undisclosed business relationship) or terminology ("in the case of courts" and "tribunal permitted by law to try cases and controversies") in applying a duty to disclose in Commonwealth. (App. A, A-32-34)

The Court's argument in this regard was not based on a comparison of the fact-finding functions of the arbitrators in Commonwealth or the Wasco County Court in this case.

The Oregon Supreme Court's references to Justice Black's opinion are unpersuasive. Justice Black used the phrase "in the case of courts" not to suggest that disclosure should be limited to purely judicial decision-making, but in connection with his conclusion that the duty to disclose was constitutionally based and that the same duty should be read into statutes governing arbitration proceedings. 393 U.S. at 148. A full quotation of the second judicial phrase Justice Black used to extend a duty of disclosure to arbitrators is

any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. 393 U.S. at 150. (language not set forth in opinion below is underscored)

The prejudice to petitioners' position shows the inappropriateness of an "actual bias" test in circumstances where there has been no public disclosure.

The lack of disclosure at the November 4, 1981 public hearing prevented the making of a contemporaneous record on the issue of impartiality based on the best available evidence. The cattle, for example, could have been inspected and videotaped, on the spot, in Cantrell's pasture, and related to bills of sale.

Instead, discovery was not authorized until October 10, 1985, nearly four years after the transaction in question. At that time petitioners' ability to obtain evidence about, e.g. the number, weight, quality and condition of the cattle was severely impaired. Documents were either destroyed or lost. Memories of witnesses finally able to be deposed had faded. The cattle had long since been turned into

hamburger.

CONCLUSION

The petition for Writ of Certiorari
should be granted.

Respectfully submitted,

Henry R. Richmond, III

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

1000 FRIENDS OF OREGON,)
the assumed name of)
Oregon Land Use Project,)
Inc., an Oregon)
nonprofit corporation,)
KELLY MCGREER, ROSEMARY)
MCGREER, JAMES G.)
PERKINS, SHIRLEE)
PERKINS, DAVID DICKSON)
and MELINDA DICKSON,)
)
Petitioners,) LUBA No. 81-132
)
vs.)
)
WASCO COUNTY COURT,)
)
Respondents.) FINAL OPINION
) AND ORDER
and)
)
DAVID KNAPP, RICHARD)
DENNIS SMITH, KEITH)
BULLOCK, SAMADHI)
MATTHEWS and CHIDVALIS)
RAJNEESH MEDITATION)
CENTER,)
)
Respondents-)
Participants.)

* * *

* * *

The Board finds Kelly McGreer and Rosemary McGreer have standing to bring this appeal. They have alleged the city threatens their water supply and, consequently, their welfare and economic livelihood. In support of this claim, the McGreers submitted an affidavit in which they claim the area in which they live has a limited water supply. They allege a demand for groundwater by "thousands of people in Rajneeshpuram" could cause their wells to run dry. As a result, they would lose water for drinking and their stock. The Board believes these facts and this claim of injury is sufficient to show adverse effect and aggrievements (p. 7).

* * *

The Board finds James Perkins and Shirlee Perkins have standing to bring

this appeal. The Perkins have alleged traffic increases as a result of the activities at Rajneeshpuram, and the increased traffic threatens their stock which use the roadway. The Board understands the Perkins to claim that their stock are "driven on these roads and will be endangered" by the traffic. Affidavit of James G. Perkins and Shirlee D. Perkins attached to Petition for Review, Item 17, Page 102. The Board believes the claim of threat to livestock as a result of increased population at Rajneeshpuram and resultant increased traffic satisfies the requirements for standing in 1979 Or Laws, ch 772, section 4(3)(b), as amended by 1981 Or Laws, ch 748. [footnote deleted]

Petitioners David and Melinda Dickson have standing to bring this appeal. They allege their ranch is 15 miles from the Big Muddy Ranch, but the road to the

ranch passes their property. Petitioners Dicksons' claim increased traffic occasioned by growth from the city will cause additional traffic on the road endangering their children and livestock. The Board believes this claim is sufficient for standing under 1979 Or Laws, ch 772, section 4(3)(b)(5).
[footnote deleted]

FACTS

The petition for incorporation was filed on October 15, 1981. The area proposed to be incorporated is about 20 miles east of Antelope, Oregon, on approximately 2135 acres. This property lies within land known as the Big Muddy Ranch. The area to be incorporated consists of about 61 percent Class VII and VIII soil, 35 percent Class VI soil and 4 percent Class II-IV soil. Agricultural activity occurred on this land in the past, but the property had been over

grazed. Record 10, 17, 20-22, 38-41, 43.

The Wasco County Court held the petition for incorporation on November 4, 1981. There was testimony both for and against the incorporation. At the close of the hearing, the county court adopted findings of fact and conclusions of law approving the petition. Record 1-45, 103.(pp. 7-9)

* * *

FOURTH ASSIGNMENT OF ERROR

"The County Court Improperly
Concluded that Goal 3 is Inapplicable
in this Proceeding."

Under this assignment of error, petitioners say the county court failed to consider whether the soils on the 64,000 acre Big Muddy Ranch were SCS Class I-VI. Petitioners say the county court only considered soils on 2,135 acres prior to making its conclusion that Goal 3 did not apply because the predominate soil type

within the 2,135 acres was not within SCS Class I-VI. Petitioners further complain the county's finding that the property is not suitable for farm use is not supported by substantial evidence. Petitioners assert the record shows the land would support grazing if reclaimed for that purpose. Petition for Review 19-20, Item 17, Page 76-77. (p.10)

* * *

The record does not reveal an exception to Goal 14 was taken, as required under the new rule. The Board notes Wasco County made extensive findings on the matter of compliance with statewide planning goals when it approved the petition for incorporation (pp. 14-15).

* * *

SIXTH ASSIGNMENT OF ERROR

"The County Court's Order is Invalid Because Petitioners Were Denied an Impartial Tribunal. Judge Cantrell's Failure to Disclose Ex Parte Contacts

and Conflicts of Interest, and His Failure to Withdraw from this Proceeding, Violated Fasano Safeguards and 14th Amendment Due Process Requirements." Item 17, p. 80.

Both petitioners and respondents agree this assignment of error would be rendered moot if the Board were to remand or reverse the decision of the Wasco County Court. County Judge Cantrell is no longer a member of the county court. Therefore, the Board does not reach this assignment of error. (p.20)

* * *